No. 437

In the

SUPREME COURT OF THE UNITED STATES

October Term 1964

OTTO V. BURNETT,

Petitioner,

v.

THE NEW YORK CENTRAL RAILROAD COMPANY,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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To the Honorable Chief Justice and
the Associate Justices of the
Supreme Court of the United States:

Petitioner, Otto V. Burnett, files this Reply Brief in support of his Petition for a Writ of Certiorari, in order to refute an argument presented by Respondent.

ADDITIONAL REASON FOR GRANTING THE WRIT

Respondent has argued that an integral and substantive provision of the Federal Employers' Liability Act requires the proper commencement of an action within three years

from the day the cause accrued, citing the case of *Bell* v. *Wabash Ry. Co.*, 58 F. 2nd 569 (8th Cir., 1932).

This same argument, as well as the same citation, was effectively disposed of by this court in *Herb* v. *Pitcairn*, 325 U.S. 77 (1945), with Mr. Justice Jackson stating:

> "We are unable to agree to an interpretation of the Federal Statute by which a case is not 'commenced' for its purposes unless instituted in a court with power to proceed to final judgment. An action is 'commenced' for these purposes as a matter of Federal law when instituted by service of process issued out of a state court, even if one which itself is unable to proceed to judgment, if state law or practice directs or permits the transfer through change of venue or otherwise to a court which does have jurisdiction to hear, try and otherwise determine that cause."

Upon reflection, Petitioner submits that the two opinions in *Herb* v. *Pitcairn*, in 324 U.S. 117 and 325 U.S. 77, control all the issues raised in this Petition.

The thrust of the two decisions is that there is nothing in the Federal Employers' Liability Act which prohibits a state statute from creating an exception to the statute of limitations contained in said act, so as to suspend the time of its running; indeed, both Justices Black and Rutledge made this very point in their dissents, on other grounds, to the opinion in 324 U.S. 117, at pp. 131, 132, 133 and 137.

As stated by Mr. Justice Black, 324 U.S. at p. 133:

> "The plainest principles of justice demand that these employees be afforded a trial. No reason that can be conceived for erecting a statutory bar of two years justifies an inference that Congress intended that employees who made bona fide efforts to prosecute their claims in a court should be barred because of unanticipated decisions as to jurisdiction. The words of the statute justify the construction that these actions were 'commenced' when they were filed in the City

Courts. Any other construction results in a frustration of the broad objectives of the act."

CONCLUSION

Petitioner submits that the decisions of the lower federal courts in this case have resulted in a frustration of the broad objectives of the Federal Employers' Liability Act; and that the Ohio Savings statute, ORC 2305.19, is that type of state law which permits the transfer of a cause to a court which does have jurisdiction to hear, try and determine that cause, the cause having been commenced, for all purposes by the Federal Act, when originally filed in the state court of Ohio.

Respectfully submitted,

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